Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD L. SELTZER, PETITIONER

VS.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can the Administrative and Appeals Court Judges refuse to review and adjudicate case issues that have been withdrawn from Discovery and Compelled Discovery earlier by petitioner upon request of MSPB; then later in the case proceedings make findings, decisions, opinions and orders on these same withdrawn issues to adversely and unlawfully totally affirm for MSPB, as the Appeals Court has done?

Can an incomplete record, lacking almost two hundred (200) documents from a 90-month period between 1983 and 1991 be Attested to the Appeals Court as the Official Administrative Record, and the same Court knowingly use such record to totally find against petitioner and affirm for MSPB?

Can all creditable and agency-approved active duty and active duty for training military reserve periods (with full pay and allowances), retroactive to 1974 Civil Service Retirement, be totally excluded from annuity increases by continued Administrative and Judicial failures to take actions indefinitely since 1986 as the record shows?

Can prohibited personnel practices cited in the regulatory authorities for both the Agencies and the Appeals Courts be unlawfully and adversely ignored by both the MSPB and the Appeals Court in their continued and unlawful findings, opinions, decisions and orders that totally affirm for MSPB in this case, and are adversely prejudicial toward petitioner's Constitutional Rights protected by Amendments IV and V?

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Appendix L — OPM letter to Seltzer on active duty days included and considered for inclusion from military service periods, March 25, 1985.

Appendix M — Chronological Record of Military Service, January 27, 1981, showing over 4100 days/points of active duty and active duty training for Seltzer, Lt. Col., CE.

Appendix N — OPM Notice of Annuity Adjustment showing increase from $1006.00 to $1,418.00 on June 1, 1985 check, not December 1, 1984 as stated by OPM.

Appendix O — OPM letter of April 16, 1986 that shows (1) 148 days of active reserve military service and (2) wrongly stating these periods of service "are used in—annuity computation".

Appendix P — Hearing Transcript page from October 17, 1991 Hearing between Seltzer and MSPB (OPM was absent), negating statements that "Mr. Seltzer has admitted he did not receive military pay throughout these periods", by MSPB and the Appeals Court (Seltzer did receive seventeen (17) days full pay, allowances and travel during these periods).

Appendix Q — Letter to MSPB Hq., dated June 8, 1992, with copies to the Appeals Court and the respondent's attorney, telling MSPB the Attested record to the Court was incomplete and documents between 1985 and 1991 did not appear as submitted to MSPB by petitioner.

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VS.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Petitioner, Richard L. Seltzer, respectfully prays that a writ of certiorari issue to review the judgement, opinion and mandate of the United States Court of Appeals for the Federal Circuit as ordered against petitioner and affirmed without remand for the Merit Systems Protection Board. Such Court of Appeals total affirmation of all and many issues in the case disregarded the Merit Systems Protection Board's refusals of adjudication on several issues of record; illegal and erroneous deletions of facts; questionable judicial findings, decisions and orders in both the initial and final decisions and false statements and erroneous references and deletions attributed solely to the Hearing Records and the Hearing Transcript. Results therefrom show adverse, prejudicial biases and prohibited personnel actions against petitioner continuing since 1986; also show arbitrary, capricious, abusive and unlawful procedures unsupported by substantial facts

or evidences that are affirmed by the Appeals Court. Further, despite new evidence and strong objections to the Appeals Court, the Merit Systems Protection Board has allowed continuing erroneous and arbitrary illegal overpayment collections by the agency (Office of Personnel Management) without evidences or facts to the present date that total extraordinary economic and financial losses to petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals (CAFC) is reported as Seltzer v. OPM, 833 F.2d 975 (Fed. Cir. 1987), Certiorari Denied, 486 U.S. 1024 (1988), Rehearing Denied, 487 U.S. 1243 (1988), and appears in Appendix A to this Petition. Seltzer v. OPM, Initial Decision, January 3, 1990, Docket Number CH08318910690, Merit Systems Protection Board (MSPB), appears in Appendix B to this Petition. Seltzer v. OPM, Final Decision, May 3, 1991, Docket Number CH08318910690, Headquarters MSPB, appears in Appendix C to this Petition. Seltzer v. OPM, Initial Decision, December 31, 1991, Docket Number CH-0831-91-0663-I-1, MSPB, appears in Appendix D to this Petition. Final Decision, April 23, 1992, Docket Number CH0893191066311, Headquarters MSPB, appears as Appendix E to this Petition.

JURISDICTION

The Court of Appeals (CAFC) Opinion and Judgement was filed on October 19, 1992, Seltzer v. OPM, Disposition Number 92-3450, and appears as Appendix F to this Petition. A timely Petition for Rehearing was filed and denied by the Court on November 18, 1992, and appears as Appendix G to this Petition. The Mandate was issued November 25, 1992, Ordered and Adjudged AFFIRMED, and appears as Appendix H to this Petition. Denial by the Court of Petitioner's New-Evidence filing, November 2, 1992 was filed November 5, 1992 by the Court and Denied November 17, 1992 and appears as Appendix I to this Petition. Denial of Suggestion for Rehearing In Banc is improperly denied with New-Evidence motion, November 17, 1992. It was mailed to the Court as instructed by the Court in its letter dated July 21,

1992. Documents appear in Appendix J to this Petition. No reason on verbal appeal was given.

Because there are questionable decisions and several other matters presented below as some Reasons for Granting the Writ, petitioner charges that the facts in the record show there has been substantial refusals of both the Administrative Judges and Court Justices to act and adjudicate certain case issues that were properly and timely before them in this case. Supreme Court Jurisdiction follows:

> Judge's decision to refuse to act on case is subject to review if party is dissatisfied and makes timely objection. Edwards v. U.S., C.A.Fla.1964, 334 F.2d 360, certiorari denied 85 S.Ct. 721, 379 U.S. 1000, 13 L.Ed.2d 702. (Chapter 21, Courts and Judges, 28 United States Code, Section 455, Note 18 (Review)). (1)

Supreme Court Jurisdiction is also invoked under Title 28 U.S.C., Section 1254(1), Courts of Appeals, Certiorari Appeals, Certified Questions (Writ of Certiorari). There are other pertinent reasons. Title 28 U.S.C., Section 1651 under Writs(a) states:

> —Writs (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.
>
> (28 Section 1651, Judicial Procedure). Decisions. In revising the entire Judicial Code, former Title 28 (Title 28 U.S.C., 1940 ed.), it was the aim of Congress to establish a single procedural scheme to cover all incidences of procedure in the federal courts not provided for by the rules of civil procedure and to apply the provisions except when otherwise indicated to all civil actions of whatever nature. U.S. v. National City

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(1) Petitioner has consistently and strongly objected in all his appeals to both the MSPB and the Appeals Court (CAFC) since 1989 on the refusals of the judges to act and adjudicate on several major issues of the case, particularly the issue that active duty military service credits by OPM have not been included in monthly CSRA annuity retroactive to 1974.

Lines, D.C. Cal. 1948, 80 F.Supp. 734, motion denied 69 S.Ct. 955, 959, 337 U.S. 78, 55, 93 L.Ed. 1226, 1207, 10 A.L.R.2d. 921. See, also, Hadlich v. American Mail Line, D.C.Cal. 1949, 82 F.Supp. 562.

(28 Section 1651, Note 5)—Supreme Court—A case being properly in the Supreme Court by appeal, *the court has a right to issue any writ which may be* necessary to render its appellate jurisdiction effectual. Ex Parte Milwaukee R. Co., 1866, 72 U.S. 188, 5 Wall. 188, 18 L.Ed. 676. (2)

(28 Section 1651, Note 5)—United States Supreme Court has power to issue extraordinary writs of mandamus, prohibition, and injunction, but such remedies should be resorted to only where appeal is

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(2) This case now before the Supreme Court under 28 U.S.C., Section 1254(1) is comprised of many diverse and complex issues, some of which were earlier in this Court in Seltzer v. OPM, 833 F.2d 975 (Fed. Cir. 1987), cert. denied, 486 U.S. 1024 (1988). It is hereby considered necessary to advise this Court of the many diverse and tedious personnel processes the petitioner has been subjected to in numerous appeals to both the MSPB (Board) and the Appeals Court (CAFC) in fruitless attempts to get the remaining issues in this case resolved and/or adjudicated for more than seven (7) years. The facts in the record clearly show that petitioner time and again has cited pertinent and lawful cases to both the MSPB and CAFC citing their own statutory authorities and their rules and regulations that prohibit explicitly the extremes in unlawful findings, decisions and orders they have generated in seven (7) years adversely against petitioner. Both the MSPB and CAFC have abused, ignored or mis-applied petitioner's rights and benefits that were always protected under such statutory and regulatory authorities as these:

Active Military Duty Creditable for CSRA Annuity. Title 5 U.S.C., Sections 8331 and 8332 (Chapter 83), Retirement; Title 10 U.S.C., Sections 1331-1337 (Chapter 67), Military Law; Title 38 U.S.C., Sections 2021-2024, Veterans' Benefits; Title 5 U.S.C., Section 101, Veterans' Benefits; Title 5 U.S.C., Section 3304a, Competitive Service (Armed Forces Credits and TAPERS); Title 10 U.S.C., Section 1001 (Chapter 51), Reserve Components. Title 5 U.S.C., Section 7701, Appellate Procedures; Title 5 U.S.C., Section 7703, Judicial Reviews; Title 5 U.S.C., Sections 702 and 706, Judicial Reviews.

clearly inadequate, and they are reserved for really extraordinary causes. Ex parte Fahey, Cal.1947, 67 S.Ct. 1588, 332 U.S. 258, 91 L.Ed. 1014.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Power of the Supreme Court is Judicial Power *in law and equity* under Section 2, Article III of the United States Constitution:

> The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the law of the United States, and treaties made, or which shall be made, under their authority—to controversies to which the United States shall be a party:—In all other cases before mentioned, the Supreme Court shall have apellato jurisdiction: both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Petitioner's Constitutional Rights under Amendments IV and V and VIII have been adversely abused. Agencies' Rules cite prohibitions against unreasonable seizures and public use of the property, prohibitions against adverse actions without due process, and prohibitions against cruel and unusual punishments. Such prohibitions have been ignored by OPM, MSPB and the Appeals Court repetitively since 1986; and increased repetitively since 1989, such seizures and total lack of due process in prohibited personnel practices and judicial findings, decisions and orders have been strongly objected to and consistently appealed by petitioner. The preponderant facts are in all records since 1986.

> Amendment IV—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,—.
>
> Amendment V—No person shall be—deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Amendment VIII—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner retired from the Civil Service on August 30, 1974 with a total retirement annuity based upon ten (10) years and seven (7) months civil service and exactly eleven (11) years and three (3) months and twenty (20) days active reserve military duty, with full-time pay and allowances. To this total was properly added five (5) months and eighteen (18) days of unused sick leave after total Federal Civilian and Military Service was computed. Total Service Credit for retirement was twenty-two (22) years, four (4) months and eight (8) days. See Appendix K to this Petition. In 1975, OPM arbitrarily reduced both Service Computation date and Unused Sick Leave to a total service of twenty-two (22) years, zero (0) months and twenty-six (26) days, resulting in an annuity loss to petitioner of three (3) months and twenty-two (22) days and $23.27 monthly in annuity since February 1975. In 1983, OPM approved Survivor Benefits for petitioner's wife after appeals and for the first time petitioner received an official copy of his personnel file. In reviewing this file above deletion of military service credits and other periods of military service were found as creditable service and correspondence began with OPM on January 30, 1985. See Appendix L to this Petition. In March 25, 1985 letter OPM advised they would recompute annuity to include 17 days active duty and other periods were under review. See Appendix M to this Petition. On June 1, 1985 a new check was issued by OPM to petitioner with a new gross amount of $1,418.00, an increase from $1,006.00 of $412.00 monthly. See Appendix N to this Petition. On July 1, 1986 OPM reduced gross annuity from $1,418.00 to $994.00, reduced annuity further by sums attributed to overpayment collections retroactive to 1983 and falsely stated that 22 years, 4 months and 28 days were periods of military service and civil service used in annuity computation. See Appendix O to this Petition that shows 148 days of military service credits approved by OPM in 1986, and still not included in annuity. An additional 71 days between 01/30/64 and 08/30/74 of military service credits were considered dual service and resulted in petitioner's appeals and orders in Seltzer v. OPM, 833 F .2d 975 (Fed. Cir. 1987), Certiorari Denied, 486 U.S. 1024 (1988), Rehearing Denied, 487 U.S. 1243 (1988). See Appendix A to this Petition. Further appeals to both OPM and MSPB began again in 1988 on all remaining issues other than the 71 days of military duty considered dual credits. Such issues as unlawful overpayment collections of active military duty days and Sick Leave

credits from annuity in 1975; unlawful overpayment collections from petitioner by annuity reductions in 1985-1986 of six (6) months at $412.00 each; varied reductions of $565.00, $357.00, $51.00, $20.00, and $23.00; overpayment collections of $4,080.00 (1983-1986), $7,291.00 (1986-1989) and $2,472.00 (1986-1989); unlawful and false Social Security Administration military Post-56 attributions of $27.00 retroactive to 1983. Military Service Regular full-time duty and Reserve active service totalling a remaining 637 days remained unadjudicated in 1986-1989. By December 12, 1989 Reconsideration Decision, OPM did approve 168 and 208 days of military duty as annuity increases but to date, not one (1) day or dollar has been included in petitioner's annuity. Between 1989 Reconsideration Decision of December 12, 1989 and the Final Decision, issued May 3, 1991 by MSPB, petitioner's appeals objected to the above unlawful overpayment collections from annuity totalling tens of thousands of dollars; appealed the lack of actions by both the dilatory OPM and MSPB; appealed for annuity increases of approved military credits by OPM totalling 168 days and 208 days; and appealed on extensive delays and prohibited personnel practices. The MSPB Remand Order vacating the Initial Decision dated May 3, 1991 by MSPB Headquarters was extensive and comprehensive (see Appendix C). Petitioner believed all issues that were unresolved on retroactive records and evidences from 1974-1975 to 1991 would finally be administrated fully under proper rules, regulations and statutory authorities covering OPM's personnel actions and MSPB Adjudication that was complete, fair and lawfully based upon the facts in the record between 1985 and 1991. Such expectations proved to be absolutely groundless. To date not one single issue of record has been resolved despite preponderant factual evidences supporting petitioner shown in the Hearing Record, the Hearing Transcript and the latest petitions. Opinion and judgement in the Appeals Court Opinion, Judgement and Mandate of October 19, 1992 and November 17, 1992, disregards false, incomplete and misleading statements by the Justice Department on behalf of MSPB/OPM in their informal brief, dated July 10, 1992 to the Appeals Court on this case. The Appeals Court overlooks MSPB decisions that are arbitrary, capricious, abuses of discretion, not in accordance with law, obtained without procedures required by law or unsupported by substantial evidence. Further, the Appeals Court supports the MSPB's decisions because it sees substantial evidence despite preponderant evidence to

the contrary in the Hearing Record, Hearing Transcript and latest appeals/petitions from petitioner. A blanket, across-the-board affirmation is made of every single issue and this Appeals Court has further flatly refused to adjudicate issues properly before it as the record shows, even to the extent of allowing the agency (OPM) to reduce petitioner's annuity another $15.00 a month based on false information while the case was in the Court, pending decision. New evidence and appeal of this unlawful OPM action without notice or due process was denied by the Court. See Appendix I to this Petition. The Appeals Court in its disposition dated October 19, 1992 fails entirely as does the Justice Department, to state that the Board ordered specifically as follows (see Appendix D to this Petition):

> ORDER—The agency is ORDERED to cancel the amount of the overpay-attributable to its unfounded offset of $27.00 per month and it erroneous entry of $1,418.00 into the computer system between December 1984 and May 1985 and to refund those amounts to the appellant. (underlinings added). (The Final Decision also ordered refund).

This order was based on the following Initial Decision (Appx. D9):

> DECISION—The agency's action is REVERSED with regard to the overpayment attributed to the offset for post-1956 military service and attributed to the incorrect computer entry from December 1984 through April of 1985. (Final Decision ordered cancel and refund).

By September 26, 1991, Memorandum of Telephonic Hearing Conference, the Board stated:

> On September 25, 1991, I held a telephonic prehearing conference with the appellant. OPM did not respond to my order of September 12, 1991, and therefore waived the prohibition against ex parte contact. (underlinings added).
>
> (On October 17, 1991) 1:00 p.m.—Mr. Seltzer is present here today;—the Office of Personnel Management is not present.—Mr. Seltzer is the only witness and representing himself, I am going to swear him in at the beginning and he will begin his testimony.

Therefore, if there was no OPM testimony and nothing in the record to support it, how can the Board in its Initial Decision (Appx. D9) say:

> The agency's action is AFFIRMED with regard to—the creditability of appellant's military service and unused sick leave,—

when preponderant facts and evidence submitted in the Hearing Record and Hearing Transcript showed quite clearly OPM's dilatory actions, lack of responses and no mention whatever of either appellant's active duty credits since December 12, 1989 Reconsideration Decision or its deletions of Unused Creditable Sick Leave credits of 168 days in 1975. Petitioner further claims the Administrative Judge presiding at the October 17, 1991 Hearing with petitioner only in attendance (OPM was absent) made unlawful Ex Parte communication with both Justice Department and/or OPM because the respondent's Informal Brief on the case dated July 10, 1992, included fifteen (15) assorted documents that were only in the Hearing Record and referenced in the Hearing Transcript. These were all factual evidences at the Hearing in support of petitioner's claims for annuity increases. Instead they are used adversely against petitioner in OPM brief to the Appeals Court because the sitting Administrative Judge had Ex Parte communications in this case totally on behalf of OPM, and the Justice Department. Petitioner had absolutely no recourse to this July 10, 1992 OPM brief with facts and evidences against the "tailored" and biased statements that were presented to the Appeals Court with documents unlawfully used by respondent. The Hearing Documents used were only 15 from the total of 98 received from the Administrative Judge; used as enclosures by the Justice Department. The brief shows it was written, edited and finalized to delete facts supporting petitioner and manufacture material that totally supports both OPM and MSPB in all findings, reasons and opinions given to the Appeals Court. Petitioner's response to the Appeals Court on July 23, 1992, had fully objected to fifty-two (52) new citations of Court cases, laws and MSPB cases and regulatory authorities petitioner had never heard of that were now injected into the case in respondent's attempts to retry issues and OPM/MSPB actions now before the Court. Petitioner urged that these documents, first listed in petitioner's Discovery letter to OPM and again in Motion To Compel Discovery to MSPB (withdrawn at request of the sitting Administrative Judge), should be removed from

the record with associated statements as prohibited entries by respondent, and respondent should be sanctioned. (3)

> (Title 28 U.S.C., Section 455 (Courts and Judges). Interest of justice or judge—Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest—or is related to or connected with any party—as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. (June 25, 1948, c. 646, 62 Stat. 908).

If the MSPB Administrative Judge, as a Decision-making official (see 5 C.F.R. 1201.101) is exempt from the Federal Statute above, there are the MSPB's own regulations as 5 C.F.R., 1201.101, 1201.102 and 1201.103 that prohibit Ex Parte communications not waivered by party/parties. Further on these matters the record clearly shows that the Agency (OPM) had made no response whatever to Board Orders on the Prehearing Conference and Hearing Dated September 12, 1991; there was no new documentation from OPM since its letter dated August 16, 1991 to the Board reemphasizing OPM's file was already submitted with reconsideration decision dated October 12, 1989, and OPM was not at the Hearing. Petitioner had no opportunity to either cross examine or refute OPM or Justice Department on these fifty-two (52) new citations, laws or MSPB cases. Neither Records, Hearing Transcript or evidence supports unfounded material in the informal brief dated July 10, 1992 prepared for OPM by the Justice Department. In either case, this brief conflicts with law or conflicts with agency rules and regulations (C.F.R. 1201.101-103), by use of a complete set of documents and transcript tapes obtained by Ex Parte actions. Hearing Records do show documents that were only entered by petitioner as evidence at the October 17, 1991 Hearing were from the Record and justified again refunds; "the lack of consistency among OPM's figures and its unexplained changes" in MSPB order to refund amounts of $27.00

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(3) Because OPM was absent from the Hearing petitioner urged sanctioning. 15 documents petitioner tried to prohibit from the case at this late date when he had no recourse whatever for rebuttal were exactly the same documents the Administrative Judge in the case (and Hearing) asked petitioner to withdraw from Discovery; they would not be needed in the October 17, 1992 Hearing.

and $1,418.00 to petitioner; total refunds not received to date. The Final Decision dated April 23, 1992 (Appendix E to this Petition) from MSPB Headquarters stated:

> We order the agency to cancel the amount of the overpayment attributable to its unfounded offset of $27.00 per month and its erroneous entry of $1,418.00 as the appellant's monthly annuity amount between December 1984 and May 1985, and to refund those amounts to the appellant. The agency must complete this action within 20 days of the date of this decision. (underlinings are added).

There was no refund from OPM. Petitioner addressed OPM on progress as ordered by MSPB. OPM reduced annuity an additional $15.00 monthly unlawfully, without prior 30-day notice as due process, and falsely also claimed this $15.00 annuity reduction was also a Social Security Post-1956 military service attribution updated to 1992. The Appeals Court refused to adjudicate either the monetary refunds or the $27.00 SSA off-set or the new $15.00 SSA off-set unlawfully made by OPM retroactive to 1983, contending the matter of SSA off-sets was still an MSPB matter; this despite the Final Decision to the contrary. See Appendix I to this Petition. The Economic and Financial losses to petitioner in addition to this latest $15.00 offset in August 1992 annuity, are extensive and have been consistently appealed as improper and unlawful agency annuity reductions since 1986. (4) The monetary amounts were included in the October 17, 1991 Hearing Record and Hearing Transcripts and to the

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(4) OPM's annuity offsets including 1975 Sick-Leave and Total-Service Computations (1975-1993– 204 months). —$90,208.00

Creditable Active Duty Military Service (with pay and allowances), as a U.S. Army Reserve Enlisted Man or Officer during World-War II, Korea and Vietnam Era; totals approved by OPM are 148 days, 168 days, and 208 days in 1986 and 1989 letters. Total used, 168 days retroactive to 1975 (1975-1993– 204 months X 168 days). —$84,104.00.

Active Military Reserve (USAR) Service with full pay, also without pay but with allowances, such as Troop Training assignments under orders and five-year attendance at U.S. Army Command and General Staff College; completed and graduated as a Lt. Colonel. Total days, including above active duty days with pay between 1975 and 1993 are 637 days (637 X 204 months). —$406,671.00.

Appeals Court in petitioner's June 16, 1992 Informal Brief and appeals. See particularly Appendices I and J to this Petition. To present date (January 1993) all appeals through the agencies and Appeals Courts since 1985 for restitution of unlawful reductions and prohibited agency offsets in petitioner's monthly annuity have neither been resolved nor properly adjudicated. Amounts on page 11 claimed by petitioner are updated from the recent records to January 1993: The Military Chronological Records appended herewith as Appendices K, M, N and O to this Petition includes the Active Duty Military Service Periods that were approved by OPM in their letters of April 16, 1986. These were enclosures also to both the MSPB and the Appeals Court in petitioner's briefs for the October 17, 1991 Hearing by MSPB and the June 16, 1992 petition to the Appeals Court. Periods of Active Duty Military Service totalling 168 days and 208 days were approved in the OPM Reconsideration Decision of October 12, 1989 which was reaffirmed as representing OPM's position on all issues to the Administrative Judge dated August 16, 1991, by OPM letter and enclosures. This letter was entered into evidence at the October 17, 1991 Hearing and was the basis of ordered refund to petitioner of $27.00 Post-1956 Social Security offset and the annuity reduction and overpayment collection of the $1,418.00.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted for several reasons, all of which are considered proper for Supreme Court consideration. Foremost, should be the factual evidences presented in this Petition that show the Administrative Adjudication and Affirmation of the agency's dilatory, arbitrary, unlawful and repetitive adverse abuses of petitioner's Constitutional and Civil Service and Military Service rights by MSPB, lacks a proper review by the Appeals Court for the Federal Circuit; and were lacking proper corrective judicial action by the same Court. It is for the Appeals Court alone under Title 5 U.S.C., Section 706, Judicial Review and Scope of Review, to not only review for arbitrary, capricious and discretionary abuses but it must review to the extent necessary (1) to reach a decision, and (2) and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. These questions, interpretations and determinations by the Appeals Court must further;

> Compel agency action unlawfully withheld or unreasonably delayed.
>
> Hold unlawful and set aside agency action, findings, and conclusions found to be—not in accordance with law and:
>
> Contrary to constitutional right, power, privilege, or immunity.
>
> In excess of statutory jurisdiction, authority, or limitations, or short of statutory right.
>
> Without observance of procedure required by law.
>
> Unsupported by substantial (or preponderant) evidence in a case—reviewed on the record of an agency Hearing provided by statute. (underlinings and parentheses added).
>
> Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P.L. 89-554, Sec. 1, 80 Stat. 393.) (underlinings added).

Precedents follow:

> Title 28 U.S.C., 1651 (Chapter 111), Note 6. Courts of Appeals.—Upon an adequate showing, Court of Appeals has the power and inescapable duty, whether under this section, or under its inherent powers of appellate jurisdiction, to effectuate what seems to be the manifest ends of justice. Texaco, Inc. v. Chandler, C.A.Okl. 1965, 354 F.2d 655, certiorari denied 86 S.Ct. 1066, 383 U.S. 936, 15 L.Ed.2d 853. (underlinings added).
>
> In review under 5 USCS Section 706 court must inquire (1) whether action was within scope of agency's authority, (2) whether agency conformed to procedural requirements, and (3) whether decision was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law; third inquiry requires that court consider whether decision was based on consideration of relevant factors and whether there has been clear error of judgement. PPG Industries, Inc. v Harrison (1979, CA5) 587 F2d 237, reh den (CA5) 591 F2d

102. See 5 USCS, 706, note 74. (underlinings added.)

It is arbitrary or capricious for agency not to take into account all relevant factors in making its determination. Appalacian Power Co. v Environmental Protection Agency (1973, CA4) 477 F2d 495 (disagreed with Bell Tel. Co. v Federal Communications Com. (CA3) 503 F2d 1250, cert den 422 US 1026, 45 L Ed 2d 684, 95 S Ct 2620, reh den 423 US 886, 46 L Ed 2d 118, 96 S Ct 163) and (disapproved on other grounds Union Electric Co. v Environmental Protection Agency 427 US 246, 49 L Ed 2d 474, 96 S Ct 2518, reh den 429 US 873, 50 L Ed 2d 154, 97 S Ct 189). See 5 USCS, note 79. (underlinings added.)

Judicial review is meaningless where administrative record is insufficient to determine whether action is arbitrary and capricious, and, even within narrow scope of review mandated in evaluation of rulemaking procedures, support for agencies actions must appear in record. National Welfare Rights Organization v. Mathews (1976) 174 App DC 410, 533 F2d 637. See 5 USCS, 706, note 86. (underlinings added.)

There are minimal standards beyond which courts cannot allow administrative bodies to go, and reviewing court must satisfy itself that administrative decision has a "rational" or "reasonable" foundation in law, and, if court is not so satisfied, court must reverse administrative action. Grace Line, Inc. v. Federal Maritime Bd., CA 2, 1959, 263 F.2d 709. See Title 5 U.S.C., Section 706, note 418. (underlinings added.)

Administrative action is conclusive on review unless such action is not in accordance with law, is unsupported by competent, material and substantial evidence, or is arbitrary or capricious. R.F.C. v. Lightsey, C.A.S.C. 1950, 185 F.2d 167. See 5 U.S.C., Section 706, note 26. (underlinings added).

Petitioner claims the Appeals Court was negligent in its inescapable duty and inherent powers of appellate jurisdiction, had failed to properly complete and adjudicate all issues before it in petitioner's case and failed to address facts and relevant factors. All MSPB records and documents supporting petitioner's appeals were neither attested to, nor before the court to allow proper and adequate adjudication of all issues and review of agencies actions on the case issues. Petitioner did request remand with the mandate from the

Appeals Court in his Informal Brief of June 16, 1992 for the same reasons, word-for-word, as required under Title 5, U.S.C., Section 706 and set forth above. The Appeals Court, was given these precedents:

> Title 5 U.S.C., Sec. 706 (note 415). Judicial Review-Agencies Generally. Grounds on which agency acted must be clearly disclosed in, and sustained by the record, and agency must make plain its course of inquiry, its analysis and its reasoning. American Petroleum Institute v. Environmental Protection Agency, C.A. 10, 1976, 540 F. 2d. 1023 (also see C.A. 4, 1976, 540 F. 2d. 1188). (underlinings added.)
>
> Title 5 U.S.C., Sec. 706 (note 415). In passing upon sufficiency of administrative orders, record in its entirety must be considered. Smith & Solomon Trucking Co. v. U.S., D.C.N.J. 1966, 255 F. Supp. 243. (underlining added.)

A cursory reading of the Appeals Court Opinion and Judgement dated October 19, 1992 (Appx. F) and Board Decisions (Appx. D-E) show the Court failed to state the refunds ordered by the Board; it failed to show entitlements to approved additional reserve (military) service; it failed to show the Board had reviewed and ordered refund of SSA offsets; it identified factual evidence of annuity receipts as "circumstantial proof" even though receipts were OPM statements; failed to identify the active duty with full pay as military service approved by OPM, calling it all "inactive duty points and extension course points" listed in petitioner's chronological service record (see appendices K2, K3 and M to this Petition where all active duty is clearly identified) (5); and finally the Court closes by stating "Mr. Seltzer makes several other assertions of error that the Board adequately addressed below. Therefore, based on this record, substantial evidence supports the Board's findings. Mr. Seltzer has not shown them to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Nothing, either as assertions or addresses by the Board, are shown "below". The basis on "this" as

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(5) The Appeals Court makes reference falsely to a statement by petitioner that he "has admitted he did not receive military pay throughout these periods". The Transcript page, Appendix P to this Petition, shows petitioner only referred to one active duty order as a First Lieutenant in December 1949, as an Organized Reserve Officer (ORC). He did receive 17 active duty days and pay.

a record of "substantial evidence" is incomprehensible, when little is stated in the Opinion and Judgement that is either relevant or accurate. The facts remain that this Appeals Court has totally failed (or intentionally refused) to adjudicate all major issues in this case as shown in the records supported by the Hearing Record. The Hearing Documents, and those documents furnished to MSPB at the October 17, 1991 Hearing by petitioner were documents specifically requested by this same sitting judge from petitioner in pre-hearing conference on September 25, 1991. The judge asked for all 1985 and 1986 evidences including letters and documents because the prior case, CHO8318610427, was not available to MSPB as this case had been permanently retired. This judge further said she had all documents from prior case numbers CHO8318910189, CHO8318910690 and CHO8318910690-1 in her hands that included all evidences between 1986 and 1991. The petitioner prepared the brief for the Hearing and included exactly ninety-eight (98) documents including letters, evidences and prior MSPB orders as requested by this judge. At the Hearing, petitioner requested the total number of pages in this Hearing Brief be entered into evidence and the 108 pages were so entered by the judge. After the Initial and Final decisions dated respectively December 31, 1991 and April 23, 1992 were actioned by MSPB and before petitioner's appeal of June 16, 1992 to the Appeals Court, under jurisdictional authority, Title 5 U.S.C., Section 7703(b)(1), petitioner received a service copy on June 8, 1992 dated June 4, 1992 from MSPB Headquarters. This copy was an attestation of the total documents comprising the MSPB Administrative Record on the appeal of petitioner and attested to the Appeals Court (CAFC) only under Docket Number CH-0831-92-0663-I-1. On two pages MSPB Headquarters had listed only eleven (11) documents between July and December 1991 on page 1; and listed only six (6) documents between February and April 1992 on page 2; none were listed to the Appeals Court from prior cases identified above that had 98 documents as evidences for 1985 and 1986. Petitioner by letter to MSPB Headquarters dated June 8, 1992 (see Appendices Q1-Q2 to this Petition) advised the Index of Documents to the Appeals Court was incomplete and petitioner listed documents that totalled almost two hundred (200) pages of evidences between 1985 and 1991 from four (4) MSPB Docket Numbered cases that were in the Board's Administrative Record of Case No. 92-3450 then before the Appeals Court. A service copy of this June 8, 1992 letter to MSPB was mailed

to both the Clerk of the Appeals Court, and the respondent's counsel (Justice). Petitioner, in his June 16, 1992 Informal Brief to the Appeals Court, claimed this sitting judge did not have adequate time to review all records between 1974 and 1991 because of the 100 pages and case files requested from petitioner. Petitioner claimed also that a lack of review and oversight on many of these documents from the cases and files "-may be reasons for the erroneous findings, decisions and orders stated in the Initial Decision"; his claim followed with these statements:

> The seeming oversight in the matter of the unused Sick Leave (168 days) deleted by OPM where the judge cited one page (A-8) from ten (10) pages of factual evidence to wrongly decide against petitioner is a case in point. (all underlinings and parentheses are added.)
>
> Deleting authorized military statutory authorities in all civilian and military regulations (Title 10 U.S.C. and Title 38 U.S.C.) seemingly precluded adjudication of all military issues despite the Remand Orders from Board Headquarters. (underlinings added.)
>
> Results are, both the Initial and Final Decisions still leaves almost all of the issues in process for six years still unresolved and unadjudicated. Clear evidence that there were inadequate records and/or documents to properly adjudicate petitioner's appeal by the Chicago Region and the Headquarters of MSPB is the June 4, 1992 MSPB Certified Index of documents supposedly comprising the administrative record of CHO8319106631-1. (underlinings added.)

As argued earlier above, a cursory reading of the Appeals Court Opinion and Judgement dated October 19, 1992 (Appendix F), and Board's decisions (Appendices D and E) with comparisons shows the Appeals Court failures on several major issues in this biased case to improperly, inadequately find, decide and wrongly affirm every single issue of this case for the MSPB/OPM and against petitioner despite preponderant evidences in the record on behalf of petitioner. On behalf of petitioner the record adequately "speaks for itself". Request that the Supreme Court grant certiorari for the following reasons:

1. The Appeals Court has relied on incomplete, erroneous and inadequate official administrative records to find, decide and affirm against petitioner.

2. The Appeals Court has refused to adjudicate or review issues properly before it upon appeal and petition.

3. The Appeals Court has both generated and condoned clearly falsified findings, erroneous decisions and orders and failures of administrative agencies in prohibited practices that adversely affect petitioner's rights on due process and private property.

4. The Appeals Court has failed to address Constitutional Rights of petitioner against adverse abuses evident in the records and recent appeals made to the agencies (MSPB/OPM), by petitioner. Administrative and Judicial biases against due-process rights is because these are petitioner's military rights by law.

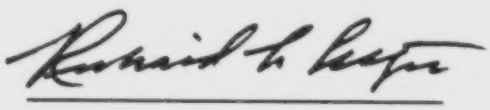
CONCLUSION

For the reasons above, the Supreme Court should issue a Writ of Certiorari to review both administrative and judicial findings, opinions and orders, particularly of the Appeals Court in matters shown above. Petitioner recognizes the great importance in regard to adverse abuses evidenced in the record against his Constitutional Rights, mostly against due process in all unlawful annuity reductions and offsets. However, it is considered far more important that the Supreme Court address foremost the prohibited administrative personnel practices and the improper and ineffectual judicial processes evidenced for the past seven (7) years in petitioner's cases. Petitioner believes there is inherent need for both these agencies and the Appeals Courts to adhere to their own rules and regulations that must embrace the Congressional intents and Statutory Authorities. Both agencies (MSPB and OPM) and the Appeals Court have ignored lawful personnel practices and made their own law; particularly in regard to petitioner's active duty Reserve Military Service. The instances of denials of actions and refusals of adjudicating such issues as unlawful overpayment collections, offsets and other reductions in petitioner's annuity, should not be allowed to stand and should be struck down. In regard to military service, Appendices D6 to D9, K, L and M to this Petition show that all Active Duty and Active Duty Training Periods are clearly identified on the U.S. Army Chronological Listings and were clearly recognizable to both of the agencies and the Appeals Court. There is no reason whatever to have continued denials or refusals by the agencies on refunds of unlawful

overpayment collections and offsets or the increases in annuity for petitioner. If the Supreme Court elects not to address these issues in a Writ of Certiorari, then petitioner asks for remand of this case back to the Appeals Court with specific orders to (1) reopen the case, (2) complete a wide-ranging adjudication on all issues based upon the complete record and (3) determine and order retroactive refunds and annuity increases to petitioner on respective unlawful collections and approved military service periods. There can be no reason to further deny petitioner justified relief that has been held in abeyance for more than seven (7) years (see Appendix L).

Date: March 24, 1993.

Respectfully submitted,



RICHARD L. SELTZER, Petitioner
pro se

SELTZER v OFFICE OF PERSONNEL MANAGEMENT
Cite as 833 F.2d 975 (Fed. Cir. 1987)

Richard L. SELTZER, Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent

No. 87-3257.

United States Court of Appeals, Federal Circuit.

Nov. 16, 1987.

Retiree appealed Office of Personnel Management's denial of civil service annuity credit for time he spent on active duty as reserve officer while concurrently earning credit as federal civilian employee. The Merit Systems Protection Board, 32 M.S.P.R. 306, affirmed. On appeal, the Court of Appeals, Jack R. Miller, Senior Circuit Judge, held that prohibition against double credit contained in federal personnel manual did not conflict with language, purpose or history of Civil Service Reform Act.

Affirmed.

United States 39(15)

Federal civilian employee was not entitled to civil service annuity credit for time spent on active duty as reserve officer in United States Army while concurrently earning credit as federal civilian employee; prohibition against double credit contained in federal personnel manual did not conflict with language, purpose, or history of Civil Service Retirement Act. 5 U.S.C.A. § 8332(c)(1)(A).

Michael A. Nardolilli, Spriggs, Bode & Hollingsworth, Washington, D.C., argued for petitioner.

Hillary A. Stern, Commercial Litigation Branch, Dept. of Justice, Washington, D.C., argued for respondent; With him on brief were Richard K. Willard, Asst. Atty. Gen., David M. Cohen,

Director and Robert A. Reutershan, Asst. Director. Also on brief were Hugh Hewitt, Gen. Counsel, Thomas F. Moyer, Asst. Gen. Counsel and Murray M. Meeker, Office of Personnel Management, of counsel.

Before FREIDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

JACK R. MILLER, Senior Circuit Judge.

This appeal is from a decision of the Merit Systems Protection Board (Board), 32 M.S.P.R. 306, Docket No. CH08318610427, affirming the Office of Personnel Management's (OPM's) denial of civil service annuity credit for time spent on active duty as a reserve officer in the U.S. Army while concurrently earning credit as a federal civilian employee. We affirm.

BACKGROUND

Petitioner earned civil service annuity credit for time spent as a federal civilian employee from January 30, 1964, until his retirement on August 30, 1974. During this time, while on leave which was credited toward his civil service retirement, he spent several active duty training periods as a reserve officer in the U.S. Army for which he seeks an additional 71 days of civil service annuity credit. OPM denied his request, citing the Federal Personnel Manual (FPM) Supplement 831-1, Subchapter S3-5(d):

> *Double credit not permitted.* Under no circumstances is credit allowed under the law for both civilian and military service covering the same period of time. The period of creditable service cannot exceed the actual calendar time.

The board affirmed OPM's decision and, after full consideration, denied a petition for review. Appeal followed.

OPINION

Petitioner argues that the prohibition against double credit contained in the FPM is invalid because it conflicts with section 8332(c)(1)(A) of the Civil Service Retirement Act (CSRA), 5

U.S.C. § 8332(c)(1)(A)(1982), which provides that civil service retirement credit "shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity . . . is based." According to petitioner, section 8332 mandates not only that credit be given for military service performed while civilian credit was not being earned, but also that double credit be awarded for concurrent periods of military and civilian service. It is reasoned that because petitioner's situation is not within the exceptions enumerated in section 8332, *see* 5 U.S.C. §§ 8332(c), (d), and (j), Congress intended that double credit be awarded. *See Espenschied v. Merit Systems Protection Board*, 804 F.2d 1233, 1237 (Fed.Cir.1986), *cert. denied* — U.S. —, 107 S.Ct. 1896, 95 L.Ed.2d 503 (1987) (where exceptions are specifically enumerated in a statute, rules of statutory construction suggest that situations not excepted are covered by the statute's general provisions).

Contrary to petitioner's urgings, we conclude that OPM's interpretation (as embodied in FPM Supplement 831-1, Subchapter S3-5(d)) does not conflict with the language, purpose, or history of the CSRA. Section 8332(a) of the statute defines creditable service in terms of calendar years and months of service, and section 8332(c)(1)(A) mandates that certain periods of military service be recognized or "included" in civil service retirement computations. One purpose of this provision was to provide adequate recognition of years spent in federal service by persons who might not otherwise receive full annuity credit. *See Bailey v. United States*, 206 Ct.Cl. 169, 511 F.2d 540 (1975) (interpreting an earlier version of the act); *Prentiss v. United States*, 123 Ct.Cl. 225, 105 F.Supp. 989 (1952). As we read the statute, the mandate of section 8332(c)(1)(A) is satisfied when the relevant calendar periods of qualified military service are recognized, i.e., when they are "included" in an annuitant's civil service annuity computations. We note that OPM has credited petitioner with calendar periods of active duty service performed while he was not receiving credit as a civilian employee.

We also note that petitioner received civil service credit for the disputed 71 calendar days during which he served on active duty. Petitioner's argument, that these 71 days of service should

have been "included" twice, conflicts with a Congressional objective to avoid double credits while providing what was deemed to be adequate credit for services rendered. *See* 5 U.S.C. §8332(b)(9) (service as a substitute teacher for the government of the District of Columbia is creditable unless such service is credited for benefits under other retirement systems); 5 U.S.C. § 8332(d)(2) (members of Congress may not receive credit for military service for which credit is allowed for purpose of retired pay under other statutes); 5 U.S.C. § 8332(j) (military service is excluded when eligible for social security benefits under 42 U.S.C. § 402). Rules of statutory construction suggest that interpretations at odds with a legislative scheme are not favored. *United States v. Clark*, 454 U.S. 555, 561, 102 S.Ct. 805, 809, 70 L.Ed.2d 768 (1982).

Petitioner acknowledges that the statute generally forbids double credits, noting that section 8332(c)(2) precludes recipients of military retired pay from receiving civil service credit for periods already credited toward their military retirement. However, petitioner points to the two exceptions listed in section 8332(c)(2). The first exception applies to persons receiving military retired pay on account of service-connected disabilities, and the second applies to persons retired under chapter 67 of title 10 (10 U.S.C. § 1331 et seq.) Petitioner argues that because he was retired under chapter 67 of title 10, he is entitled to double credit. What petitioner fails to recognize is that this exception would, at most, entitle him to 71 days' credit toward his military retirement as well as 71 days' credit toward his civil service retirment. This is the type of double credit to which section 8332(c)(2) speaks—not the 142 days of civil service credit for 71 calendar days of service that petitioner seeks. *See Merrill v. United States*, 168 Ct.Cl. 1, 338 F.2d 372 (1964). It should be emphasized that petitioner *has* received credit toward his military retirement and credit toward his civil service retirement for the calendar periods involved.

Nothing in the statute, apart from one provision that permits unused sick leave to be credited toward retirement (5 U.S.C. § 8339(m)), suggests that one could earn more than a day's civil service credit for a day's work. Indeed, the existence of an explicit provision, providing additional civil service credit for unused sick leave that accrued concurrently with calendar year credit,

sutggests that if Congress had intended to permit double credit in petitioner's situation, it would have done so explicitly with a similar provision. *See* 2A Singer, *Sutherland Statutory Construction*, § 47.23 (4th ed. 1984).

Moreover, the prohibition against double credit and the provisions of the statute relied upon by petitioner have co-existed (in various forms) for decades. *See* 5 U.S.C. § 2253 (Supp. IV 1957); 5 U.S.C. § 8332 (1970); 5 U.S.C. § 8332 (1982); *Federal Personnel Manual*, Chapter R5 (August 14, 1945 ed.); *Federal Personnel Manual*, Chapter R-5-20 (Feb. 15, 1962 ed.); *Federal Personnel Manual*, Supp. 831-1, Subchapter S3-5(d) (Sept. 21, 1981 ed.). If, as petitioner urges, this prohibition is without statutory foundation and is contrary to what Congress intended, then Congress has done nothing to "correct" an erroneous interpretation for more than thirty years. Congressional inaction in this context lends support to the Government's position that Congress is satisfied with the interpretation given the statute by the agency charged with its administration. *United States v. Clark*, 454 U.S. at 566-67, 102 S.Ct. at 812; *United States v. Federal Insurance Co.*, 805, F.2d 1012, 1017 (Fed. Cir. 1986) ("Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended *by Congress"); Beneficial Corp. v. United States*, 814 F.2d 1570, 1574 (Fed.Cir. 1987) (construction given to a statute by the administrative agency charged with carrying it out is entitled to great weight); *Ganse v. United States*, 180 Ct.Cl. 183, 189, 376 F.2d 900, 904 (1967) (courts will pay great deference to an administrative construction of a statute contemporaneously adopted and consistently maintained by the agency charged with its administration).

In view of all the foregoing, we hold that the Board did not err when it affirmed OPM's denial of double credit and refused further review of petitioner's claim. The decision of the board is affirmed.

AFFIRMED.

APPENDIX B-1

Received 1/5/90

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

RICHARD L. SELTZER
Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Agency
(CSA 1 730 093)

DOCKET NUMBER
CH08318910690

DATE: JANUARY 3, 1990

Richard L. Seltzer, pro se.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE
Victor W. Russell
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant is appealing an October 12, 1989 Office of Personnel Management (OPM) reconsideration decision that found he was not entitled to a waiver of a $7,291.00 overpayment he received from the Civil Service Retirement Fund and also found that he was not entitled to additional service credit for military service.

This appeal was actually filed on September 1, 1989—more than a month prior to OPM issuing its reconsideration decision. The appellant requested that the Board accept jurisdiction over this matter regardless of whether or not OPM issued a recon-

sideration decision. The appellant argued that the Board has jurisdiction in view of OPM's unreasonable delay in issuing its reconsideration decision. I accepted this case for adjudication by order dated October 23, 1989. I found that because OPM had finally issued a reconsideration decision in this matter, I could accept jurisdiction without addressing whether the Board had jurisdiction absent OPM issuing a reconsideration decision. *See* 5 C.F.R. § 831.110 (1989). The record closed on December 27, 1989 and this decision is based upon the written record.

For the reasons set forth below, OPM's reconsideration decision is REVERSED on the overpayment issue and AFFIRMED on the service credit issue.

ANALYSIS AND FINDINGS

I find that, after applying sanctions, OPM cannot show that the appelant received an overpayment of $7,291.00 from the Civil Service Retirement Fuind.

OPM has the burden of showing that the appellant was overpaid $7,291.00 from the Civil Service Retirement Fund. *See Brashears v. Office of Personnel Management*, 30 M.S.P.R. 250, 252 (1986).

I issued orders to OPM on September 12, October 23, and November 21, 1989 requesting it to provide certain information for the record. OPM failed to respond to the first two orders and untimely responded on December 4, 1989 to the third order. Therein OPM claimed that it did not receive my October 23 order and that it could not comply with my November 21 order because it failed to receive the appellant's records timely from its records repository in Boyers, Pennsylvania. I did not receive OPM's substantive response to this appeal until December 27, 1989.

The appellant moved in his December 20, 1989 submission that I impose sanctions on OPM for failing to file documents and for failing to initiate settlement discussions in accordance with the instructions contained in the Board's orders. The appellant requested that I award him $73,827.00 (including 8% interest) as compensation for OPM's alleged erroneous overpayments collected

from him since he retired in August of 1974 and $260,983.00 (including 8% interest) as compensation for OPM's alleged failure to credit him with 637 days of creditable reserve military service.

I find that sanctions should be applied to OPM in accordance with the provisions of 5 C.F.R. § 1201.43 (1989) for failing to timely respond to my orders. I find that the appellant was disadvantaged by OPM's failure to timely comply because the appellant did not have an opportunity to respond to OPM's evidence and argument claiming that it properly collected $7,291.00 from him as an overpayment. I do not find that OPM has shown good cause for its untimely filing of evidence on this issue. *See Sheffield v. Office of Personnel Management,* 39 M.S.P.R. 507, 511, 513-514 (1989). I am, accordingly, striking from consideration any evidence OPM submitted that would support its claim that the appellant was overpaid $7,291.00. I find, therefore, that OPM has failed to support by preponderant evidence its claim that the appellant was overpaid $7,291.00 from the Civil Service Retirement Fund.

I find no basis for granting the appellant relief beyond the amount of the overpayment OPM collected from him as set forth in OPM's reconsideration decision. I have carefully reviewed the appellant's claim that OPM owes him $73,827.00 (including 8% interest) for "overpayments" improperly collected from his since August of 1974. I do not find that the sums and computations cited by the appellant (except for the $7,291.00 overpayment actually collected by OPM) are overpayments. Although I find the appellant's various claims and computations difficult to follow, it appears that the appellant is claiming that OPM has incorrectly figured his annuity since he retired in August of 1974. I do not find that such a claim constitutes an overpayment issue within the scope of OPM's reconsideration decision and I will not address it in this decision.

I find that the appellant has failed to show that he is entitled to an additional 637 days of military service credit for the purpose of computing his Civil Service Retirement annuity.

The burden is on the appellant to show that he is entitled to an additional 637 days of military service credit for the purpose of computing his civil service annuity. *See Fontanilla v. Office of Personnel Management,* 34 M.S.P.R. 611, 613 (1987). Because the

burden of proof is on the appellant to show that he is entitled to the additional military credit claimed, the Board will not allow me to sanction OPM by rendering a default judgment awarding the appellant credit for the days of military service at issue. *See Miller v. Office of Personnel Management,* 7 M.S.P.R. 469, 474 (1981).

The appellant asserts that because the 637 days of reserve military duty at issue qualifies as creditable military service as defined by the U.S. Army and because it occurred prior to his civilian employment, this duty should be credited for civilian retirement purposes.

I do not find that the appellant has shown that the reserve military service at issue is creditable for civil service retirement purposes. 5 U.S.C. § 8331(13) states that, for civil service retirement purposes, military service must be active service in the armed forces. I find that the appellant has not shown that he was on active duty on the 637 days in question. I find, therefore, that he has not shown that the military service at issue was creditable towards his civil service annuity.

DECISION

The agency's reconsideration decision is REVERSED on the overpayment issue and AFFIRMED on the creditable military service issue.

ORDER

The agency is hereby ORDERED to repay the $7,291.00 it collected from the appellant as an overpayment of his Civil Service Retirement annuity.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

FOR THE BOARD: (s) Victor W. Russell
Victor W. Russell
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on FEB 07 1990,

unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board of the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial deci-

sion becomes final.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX B-7

CERTIFICATE OF SERVICE

I certify that the attached Document was sent by regular mail this day to each of the following:

Appellant

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163

Agency's Representative

Bruce Hughes
Technical Reference Branch
Retirement Policy Division
U.S. Office of Personnel Management
P.O. Box 16
Washington, D.C. 20044

Other

Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

January 3, 1990
(Date)

(s) Pat DuBrock
Pat DuBrock
Legal Clerk

APPENDIX C-1

Received 5/6/91

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD L. SELTZER,
Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Agency
(CSA 1 730 093)

DOCKET NUMBER
CH08318910690

DATE MAY 3 1991

Richard L. Seltzer, New Palestine, Indiana, pro se.
Reginald M. Jones, Jr., Washington, D.C., for the agency.

BEFORE
Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The Office of Personnel Management (OPM) filed a petition for review of the initial decision, issued January 3, 1990, that did not sustain its reconsideration decision and the appellant filed a cross petition for review. For the reasons below, the Bioard GRANTS both the petition and the cross petition under 5 U.S.C. § 7701(e), VACATES the initial decision, and REMANDS the case to the regional office.

BACKGROUND

In a reconsideration decision issued on October 12, 1989, OPM found that the appellant was not entitled to waiver of a $7,291.00 overpayment from the Civil Service Retirement Fund

because he had submitted no evidence in support of a request for waiver and also found that the appellant was not entitled to additional service credit for military service. The appellant petitioned for appeal of that decision.

OPM failed to respond to the administrative judge's October 23, 1989 acknowledgment order requiring the submission of documents concerning the merits of the appellant's appeal. That order required that OPM serve the administrative judge and the appellant with the material within 20 days. When OPM did not respond, the administrative judge, on November 21, 1989, issued a second order, requiring that OPM submit its response no later than November 28, 1989.

On November 30, 1989, OPM submitted a letter stating that the October 23 order did not reach the office of the agency representative and, as a consequence, the appellant's records also did not reach that office. OPM's letter further stated that OPM had contacted the records center and requested the appellant's file and that it would file a response within two weeks.

On December 8, 1989, the administrative judge issued an order closing the record on December 27, 1989, and informing the parties that all evidence and argument must be filed no later than December 22, 1989. He noted in that order that the parties may address what sanctions, if any, should be imposed on the agency for failing to meet his orders imposing deadlines for contacting the appellant and for filing responses to the appeal.

The appellant responded to the administrative judge's order, requesting sanctions if OPM did not timely respond to the order closing the record. By letter dated December 21, 1989, OPM transmitted its file in the appellant's case. The filing was received in the Chicago Regional Office on December 27, 1989. OPM did not, however, address the question of sanctions.

The administrative judge applied sanctions to OPM for its failure to timely respond to his orders. He struck from consideration any evidence submitted by OPM that would support its claim that the appellant was overpaid, finding that OPM did not show good cause for its untimely filing of evidence and that the appellant was disadvantaged by OPM's failure to timely reply. He did not

sustain the reconsideration decision, therefore, because, without the stricken evidence, OPM failed to support by the preponderance of the evidence its claim that the appellant was overpaid.

The administrative judge found no basis for granting the appellant relief beyond the amount of the overpayment OPM already had collected from him. He found that the appellant's various claims and computations were actually assertions that OPM incorrectly computed the annuity and that such a claim does not constitute an overpayment claim within the scope of OPM's reconsideration decision or the subsequent appeal to the Board based on that decision.

Finally, the administrative judge found that the appellant failed to show entitlement to an additional 637 days of military service credit for the purpose of computing his civil service retirement annutiy He found that the appellant did not show that the reserve military service at issue is creditable in light of 5 U.S.C. § 8331(13), which states that, for civil service retirement purposes, military service must be active service.

In its petition for review, the agency asserts that the administrative judge improperly applied the sanction provision of 5 C.F.R. § 1201.43 because the administrative judge received OPM's evidence before the date set for the close of the record.

In his cross petition for review, the appellant asserts: that the administrative judge improperly denied him relief in addition to ordering OPM to repay him the overpayment amount already collected; that the record submitted by OPM is incomplete and that the Board should review the entire record relied on by OPM in deciding his appeal; and that the 637 days for which he seeks credit are those that he served in active military status under statute and regulation and that OPM has already credited 168 of those days, but has not adjusted his annuity to account for the credit. Additionally, the appellant seeks a hearing in this appeal.

ANALYSIS

The imposition of sanctions upon a party for failure to follow orders is a matter within an administrative judge's sound dis-

cretion, but it must be used only when necessary to serve the ends of justice. *See* 5 C.F.R. §1201.43(a); *Vires v. Department of the Navy*, 38 M.S.P.R. 569, 572 (1988). Further, although the Board is not reluctant to impose sanctions against an agency when it fails to produce testimony or other evidence that is necessary for fair adjudication, sanctions should be imposed only when a party has failed to exercise the basic due diligence expected of it in complying with any order, or has exhibited negligence or bad faith in its efforts to comply. *See Rooney v. Department of Agriculture*, 26 M.S.P.R. 142 (1985); *Logan v. Department of the Navy*, 29 M.S.P.R. 573, *aff'd* 809 F.2d 789 (Fed. Cir. 1986). The Board has imposed sanctions on OPM for repeated failure to comply with proper orders. *See Sheffield v. Office of Personnel Management*, 39 M.S.P.R. 507 (1989).

In this case, however, the Board finds that the administrative judge abused his discretion in imposing sanctions. The administrative judge's December 8, 1989 order closing the record indicated that the parties could file evidence and argument until December 22, 1989. The order also asked the parties to address what sanctions, if any, should be imposed on OPM for failing to meet the administrative judge's orders imposing deadlines. The order gave no indication, however, that timely responses to it might be subjected to sanctions. Even the appellant did not read the order that way or argue that it should be read that way. He requested only that any OPM submission filed after December 22, 1989, be stricken. *See* Appeal File, Tab 10. Thus, the Board finds that the administrative judge erred by inviting a submission from OPM, and then after it was timely filed, imposing the severe sanction of refusing to accept it.

Additionally, the Board finds that imposing sanctions on OPM for its failure to respond to the administrative judge's first acknowledgment order and for its late response to the second order were not necessary to serve the ends of justice. OPM's actions did not exhibit negligence or bad faith. Whether it exercised basic diligence is a closer question, but the Board has no reason to disbelieve that OPM's representative did not receive the administrative judge's first order to produce the appellant's retirement file and

OPM did respond to the second order, albeit two days late. *See id.*

Accordingly, the Board remands this case to the regional office for a hearing and adjudication based on a record that includes OPM's submission of December 21, 1989. The Board grants the appellant's request, made in his cross petition for review, for a hearing because the administrative judge did not inform the appellant of his right to timely request a hearing on the merits.

In its reconsideration decision, OPM, in addition to finding that the appellant was overpaid $7,291.00 and not entitled to waiver of that overpayment because of his failure to submit evidence of entitlement to waiver, states: "A computation of the total annuity due [the appellant] at the correct rates, from September 1974 through August 30, 1989, when compared to the total shown as paid on the computer for that same period, is the same. Therefore [the appellant has] been paid correctly to date." The reconsideration decision is, therefore, broad in scope, addressing issues of overpayment, computation of the appellant's annuity based on his military service, and other changes to the appellant's annuity since 1974. Thus, on remand the administrative judge is not limited to consideration of the issues concerning the overpayment amount and should request the parties to provide whatever technical or explanatory evidence that he deems necessary to verify the accuracy of OPM's calculation. *See Hansen v. Office of Personnel Management*, 38 M.S.P.R. 1,3-4 (1987).

FOR THE BOARD:

(s) Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C-6

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today:

By certified mail to:

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163

By regular mail to:

Reginald M. Jones, Jr.
Retirement Policy Division
Office of Retirement and Insurance Policy
Retirement and Insurance Group
U.S. Office of Personnel Management
Post Office Box 16
Washington, D.C. 20044

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

Merit Systems Protection Board
Chicago Regional Office
230 South Dearborn Street
Room 3100
Chicago, IL 60604-1669
REMAND

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20419

May 3, 1991
(Date)
Washington, D.C.

(s) Sonia A. Crawford
for Robert E. Taylor
Clerk of the Board

APPENDIX D-1

Received 1/4/92

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

RICHARD L. SELTZER,
Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Agency
(CSA 1 730 093)

DOCKET NUMBER
CH-0831-91-0663-I-1

DATE December 31, 1991

Richard L. Seltzer, New Palestine, Indiana, pro se.
Bruce M. Hughes Washington, D.C., for the agency.

BEFORE
Mary L. Detjen
Administrative Judge

INITIAL DECISION

INTRODUCTION

On July 29, 1991, the Chicago Regional Office received the appellant's perfected appeal requesting that his previous appeal, dismissed without prejudice to allow the Office of Personnel Management (OPM) to substantiate its calculations regarding the appellant's annuity, be refiled.

The Board has jurisdiction over final OPM decisions or orders affecting an individual's entitlement to benefits under Federal civil service retirement law. *See* 5 U.S.C.A. § 8347(d) (West 1980); 5 C.F.R. § 831.110 (1991). A hearing was held in Indianapolis, Indiana, on October 17, 1991. OPM did not attend the hearing.

For the reasons discussed below, OPM's reconsideration

decision is REVERSED in part and AFFIRMED in part.

ANALYSIS AND FINDINGS

Background

The appellant retired from the Federal service in September 1974 and began receiving a Civil Service Retirement System (CSRS) annuity based on his combined military and civilian service. In May 1986, OPM determined that the appellant had received two overpayments of his (CSRS) annuity, one attributable to OPM's failure to reduce his annuity for post-1956 military service when he became eligible for Social Security benefits at age 62 and the other attributable to OPM's error in entering an incorrect amuont for the appellant's annuity into its computer system. OPM identified the total amount of the overpayment as $7,291.00.(1) Appeal File CH08318910690, Agency File, tab 4.

The appellant appealed OPM's decision to the Board and through the courts. *See Seltzer v. Office of Personnel Management*, 32 M.S.P.R. 306 (1987), *aff'd*, 833 F.2d 975 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1024 (1988), *rehearing denied*, 487 U.S. 1243 (1988). As a result of this appeal, the appellant was denied dual credit for time that he served concurrently in the military Reserve and in his civilian Federal position.

That appeal left unanswered the issues of the correctness of the overpayment; the creditability of the appellant's Reserve service that was not duplicated by his civilian service for CSRS retirement purposes; and the correctness of OPM's calculations of his annuity. The appellant appealed these issues to the Board on January 12, 1989. *See* Appeal File CH08318910189, tab 1. This appeal was dismissed because OPM had not issued a final decision on the issues raised by the appellant.

On September 1, 1989, the appellant requested reopening of his January 1989 appeal because OPM had not yet issued a final decision in his appeal. Appeal File CH08318910690, tab 1. OPM subsequently issued a reconsideration decision dated October 12,

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(1) The appellant has repaid the overpayment.

1989. In that decision, OPM found that the appellant had been overpaid $7,291.00 and that OPM had correctly computed the appellant's current annuity rate. Appeal File CH08318910690, Agency File, tab 2. OPM did not submit its file in the case within the time required by the administrative judge's orders, and he therefore did not consider it in reaching his decision, in which he found that OPM failed to substantiate the amount of the overpayment and that the appellant had failed to establish that his remaining Reserve service was creditable for CSRS purposes.

Both parties appealed this decision to the Board, which found that because OPM's file was received before the close of the record, it should have been considered; the Board therefore remanded the appeal. *See Seltzer v. Office of Personnel Management*, 47 M.S.P.R. 694 (1991).

On remand, the appeal was dismissed without prejudice to allow OPM to explain its calculations of the appellant's annuity. *See Seltzer v. Office of Personnel Management*, MSPB Docket No. CH08318910690-1 (Initial Decision June 13, 1991). When OPM did not provide the agreed upon documentation by the time established in the initial decision, the appellant filed this appeal.

OPM has not established the correctness of its overpayment calculation by preponderant evidence.

1. Overpayment Attributable to the Appellant's Post-1956 Military Service

OPM has the burden of establishing by the preponderance of the evidence that the alleged overpayment occurred. *See* 5 C.F.R. § 831.1407(a); *Owens v. Office of Personnel Management*, 45 M.S.P.R. 86, 90 (1990). The preponderance of the evidence is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56) (c)(2) (1991).

OPM reduced the appellant's annuity by $27.00 per month based on its offset of the appellant's annuity due to his post-1956 military service. The overpayment allegedly occurred between

February 23, 1983, when the appellant reached age 62 and became eligible for Social Security benefits, and May 1986, when OPM took action to recalculate the appellant's annuity. The appellant contends that there is no support from SSA for OPM's reduction of $27.00. Neither OPM's file submitted in MSPB Docket No. CH08318910690 nor OPM's submission in the present appeal includes any identifiable data or letter from the Social Security Administration that supports OPM's calculation of the offset.(2)

Accordingly, OPM has failed to prove by preponderant evidence that the appellant was overpaid as a result of an offset for post-1956 military service. *Cf. Brashears v. Office of Personnel Management,* 30 M.S.P.R. 250, 252 (1986) (OPM's presentation of computer tape furnished by SSA that appeared to indicate the appellant's eligibility for SSA benefits did not begin at age 62 was inadequate to support OPM's overpayment claim where OPM did not attempt to translate or clarify the tape or to explain or correct the absence of a completed form from SSA certifying when the appellant first became eligible for SSA benefits). In the instant

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(2) The appellant has submitted a handwritten note that he stated was stapled to the jacket of the file he received from OPM; the note states, "MBA - 284 90" and "OFFSET - 26.74." Appeal File CH08318910690, tab 10, Appellant's May 11, 1989 letter at 2 Appeal File CH-0831-91-0663-I-1, tab 10, Appellant's Exhibit A, tab H. At the hearing, the appellant pointed out that the MBA figure—presumably representing $284.90, his monthly SSA benefit—was inaccurate when compared to his January 25, 1983 notification from SSA, which stated that his monthly benefit was $242.00. Transcript at 33-34; Appellant Exhibit A, tabs H and I.

The appellant further alleges that SSA did not include his post-1956 military service in calculating his SSA benefits, and, therefore, no reduction should have been made in his CSRS annuity. The record shows, however, that SSA did credit the appellant with earnings attributable to his military service in 1963, 1968, and 1969. Appeal File CH08318910690, tab 10 at B-5 and B-6.

case, OPM did not provide the data from which it made its calculations, and the appellant has consistently challenged those calculations. This case is therefore unlike *Kerr v. Office of Personnel Management*, 29 M.S.P.R. 284, 286 (1985), *aff'd*, 802 F.2d 469 (Fed. Cir. 1986) (Table), in which the Board found that the administrative judge erred in finding that OPM failed to substantiate its $63.00 reduction of the appellant's annuity where the law contains the formula for computing the reduction, OPM stated it based its calculation on information supplied by SSA, the information from SSA was included in the Board's file, and the appellant did not challenge the accuracy of OPM's calculation.

2. Overpayment Attributable to Incorrect Data Entry

OPM contends that the appellant's December 1984 annuity payment was incorrectly entered into its computer system as $1,418.00, rather than the correct figure of $1,014.00, and the appellant continued to receive an annuity calculated on the incorrect figure until May 1986. The appellant, however, contends that he did not receive the first payment at the incorrect higher rate in Decmeber 1984, but instead received it six months later.

OPM's most recent computer printout of the appellant's annuity history shows the amount of $1,014.00 as the December 1984 payment, but that amount is crossed out and the figure of $1.418.00 is written in by hand. Appeal File CH-0831-91-0663-I-1, tab 4 at 5. OPM provided no explanation for the revisions and did not identify whoever made the changes and the person's authority to do so. Another computer record provided by OPM shows $994.00 as the amount due the appellant as of December 1984. Appeal File CH08318910690, Agency File, tab 5. A handwritten calculation shows the December 1, 1984 payment as $1,014.00, written over what appears to have been $1,418.00. Appeal File CH08318910690, tab 10 at B-19. The Employee Annuitant Master Record Printout dated May 8. 1985, shows that the appellant's gross annuity payment effective May 1, 1985, was $1,418.00, and that effective December 1, 1984, his gross annuity was $1,006.00. Appeal File CH08318910690, tab 10 at B-20.

APPENDIX D-6

Based on the lack of consistency among OPM's figures and its unexplained changes to the most recent computer printout, I find that OPM has not established by preponderant evidence that the appellant was erroneously paid $1,418.00 beginning in December 1984. Accordingly, that portion of the alleged overpayment from December 1984 through April 1985 (five months) has not been established. The remainder of the overpayment from May 1985 to May 1986, has been established, however.

The appellant has not established by preponderant evidence that he is entitled to CSRS credit for his additional reserve service.

The appellant has the burden of proving by preponderant evidence that he is entitled to the retirement credit he seeks. *See Bain v. Office of Personnel Management*, 49 M.S.P.R. 307, 309 (1991). In his submission at the hearing, the appellant claimed CSRS credit for the following inactive duty points, which were credited to his military retirement account at the rate of 1 day per point: (1) 185 days (147+21+17) from July 1, 1946, through June 30, 1950 (2) 25 days (4+6+15) from July 1, 1950, to June 30, 1951; (3) 139 days (30+42+24+15+15+13) from June 30, 1961, to January 1, 1963; (3) 196 days (25+25+18+21+27+16+16+16+16+16) from July 1, 1964, to June 30, 1969; (4) 6 days from July 1, 1970, to December 3, 1970; and (5) 86 days during 1958, 1959, 1962, and 1963. Appeal File MSPB Docket No. CH08318919690-1, tab 10 at 2; Appeal File MSPB Docket No. CH-0831-91-0663-I-1, tab 10, Introduction at 2.

It appears from the information of record that OPM has credited the appellant's military service based solely on the active duty service listed in the appellant's January 27, 1981 Chronological Record of Military Service (Corrected Copy). Appeal File CH-0831-91-0663-I-01, tab 10, Appellant's Exhibit A, tab C at 13; *see also* Appeal File CH08318910690-1 tab 6 at 3. In addition to CSRS credit for active duty points, the appellant claims CSRS credit for periods of military service identified in the chronological listing as inactive duty points and extension course points. *Id.*; Appeal File CH08318910690, tab 10, May 9, 1989 letter at 5.

Section 8332 of title 5 of the United States Code governs creditable service for CSRS retirement purposes. The appeallant is entitled to credit for military service under 5 U.S.C. § 8332(c)(1)(A). OPM defines military service as honorable active service in specified uniformed services, including the Army, the appellant's branch of service. *See FPM* Supp. 830-1, Chapter 22, Section 22A2.1-2.A. OPM further defines active military service as:

> [D]uty in the armed forces of the United States performed on a full-time basis with military pay and allowances. Active miitary service contemplates that all of an individual's time and efforts are at the disposal of the military authorities and that he or she disassociates himself or herself from the performance of civilian employment during the period of military service.
>
> OPM does not expect an agency to determine whether military service is "active duty." Agencies should request verification of military service from the appropriate branch of the armed forces and specifically ask for the dates of "active duty" service.

FPM Supp. 830-1, Chapter 22, Section 22A2.1-2.D.

Although the appellant contends that the additional periods of military service he is claiming were active duty, they are not so identified in his record of chronological service, and the appellant has admitted he did not receive military pay during these periods of service. Hearing Transcript at 10. I find, therefore, that the appellant has not established that the service for which he is seeking CSRS credit is active military service as defined by OPM.

Inactive service in the reserves is specifically excluded from creditable service for CSRS purposes even though it may be counted toward certain types of military retirement under specific provisions of military retirement law. *See FPM* Supp. 830-1,

Chapter 22, Section 22A2.1-2.E.1. Thus, the appellant's reliance on title 10 of the United States Code (3), which governs military matters, including military retirement, and title 38, which governs veterans' benefits is misplaced. The statutes cited by the appellant do not apply to creditability of military service for Federal civilian retirement purposes. Specifically, 10 U.S.C.A. § 1336 (West 1991) states:

> No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.

In the appellant's situation, however, the additional service that he is claiming is not otherwise properly credited under the CSRS, and therefore § 1336 does not bar its exclusion from consideration in determining the appellant's CSRS annuity.

The military service at issue in *Horner v. Jeffrey*, 823 F.2d

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(3) The appellant cites 10 U.S.C. § 101 to define active duty and service:

> (22) The term "active duty" means full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. It does not include full-time National Guard duty.
>
> (24) The term "active service" means service on active duty or full-time National Guard duty.

10 U.S.C.A. § 101 (West Supp. 1991).

1521 (Fed. Cir. 1987), cited by the appellant, referred to time spent at a military academy and is not service similar to the appellant's. The appellant's reliance on *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), is misplaced because in that case the plaintiff, unlike the appellant here, was attempting to obtain service credit for military retirement purposes rather than civilian retirement purposes.

The appellant has not established that he is entitled to additional credit for unused sick leave.

The appellant also has claimed that OPM erred by denying him credit for unused sick leave. The record shows that OPM corrected his service computation date because his employing agency had improperly applied unused sick leave in its determination. Appeal File CH08318910690, tab 10 at A-8. Although unused sick leave may be used in computing length of service for CSRS retirement purposes, it is not used in establishing a retiree's service computation date. *See* FPM Supp. 831-1, Subchapter S3-7. Accordingly, I find that the appellant has not established by preponderant evidence that OPM improperly credited his unused sick leave.

DECISION

The agency's action is REVERSED with regard to the overpayment attributed to the offset for post-1956 military service and attributed to the incorrect computer entry from December of 1984 through April of 1985. The agency's action is AFFIRMED with regard to the portion of the overpayment attributed to the incorrect data entry from May of 1985 to May of 1986 and with regard to the creditability of the appellant's military service and unused sick leave.

ORDER

The agency is ORDERED to cancel the amount of the overpayment attributable to its unfounded offset of $27.00 per

month and its erroneous entry of $1,418.00 into the computer system between December 1984 and May 1985 and to refund those amounts to the appellant. The agency is ORDERED to contact the Social Security Administration and to obtain the information necessary to accurately calculate the appellant's CSRS annuity based on past-1956 military service. These actions must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of his CSRS annuity and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

FOR THE BOARD: (s) Mary L. Detjen
Mary L. Detjen
Administrative Judge

NOTICE TO THE APPELLANT

This initial decision will become final on FEB 04 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your

objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX D-12

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163

Agency's Representative

Bruce Hughes
Office of Personnel Management
Retirement and Policy Division
P.O. Box 16
Washington, DC 20044

Other

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, D.C. 20415

December 31, 1991
(Date)

(s) Carmella Cobb
for Allison McKinley
Legal Clerk

APPENDIX E-1

Received 5/8/92

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD L. SELTZER, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency (CSA 1 730 093)	DOCKET NUMBER CH083191066311 DATE APR 23 1992

Richard L. Seltzer, New Palestine, Indiana, pro se.
Bruce M. Hughes, Washington, D.C., for the agency.

BEFORE
Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on December 31, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We also DENY the appellant's request that the Board hear oral argument in his case.

We ORDER the agency to cancel the amount of the overpayment attributable to its unfounded offset of $27.00 per month and its erroneous entry of $1,418.00 as the appellant's monthly annuity amount between December 1984 and May 1985, and to refund those amounts to the appellant. The agency must complete this action within 20 days of the date of this decision.

We also ORDER the agency to inform the appellant of all actions taken to comply with the Board's order and of the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). We ORDER the appellant to provide all necessary information that

the agency requests in furtherance of compliance. The appellant should, if not notified, inquire about the agency's progress. *See id.*

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. *See* 5 C.F.R. §1201.182(a).

This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703.(b)(1).

FOR THE BOARD:
Washington, D.C.

(s) Robert E. Taylor
Robert E. Taylor
Clerk of the Board

APPENDIX E-3

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today:
By certified mail to:

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163

By regular mail to:

Bruce M. Hughes
Retirement and Policy Division
Office of Retirement and Insurance Policy
Retirement and Insurance Group
U.S. Office of Personnel Management
Post Office Box 16
Washington, DC 20044

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

Merit Systems Protection Board
Chicago Regional Office
230 South Dearborn Street
Room 3100
Chicago, IL 60604-1669

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20419

APR 23 1992
(Date)
Washington, D.C.

(s) Barbara Satcher
for Robert E. Taylor
Clerk of the Board

APPENDIX F-1

United States Court of Appeals for the Federal Circuit

Received 10/22/92

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED; OCT 19 1992

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

SELTZER V OPM, 92-3450
(MSPB - CH08319106631-1)

BEST AVAILABLE COPY

APPENDIX F-2

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

92-3450
RICHARD L. SELTZER,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

DECIDED: October 19, 1992

Before MICHEL, Circuit Judge,, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

DECISION

Richard L. Seltzer appeals a final decision of the Merit Systems Protection Board (MSPB or Board), Docket No. CH083191066311. The board affirmed in part and reversed in part a decision of the Office of Personnel Management (OPM) finding an overpayment of Mr. Seltzer's retirement benefits under the Civil Service Retirement System (CSRS). Because substantial evidence support the Board's decision, this court affirms.

OPINION

This court sustains a Board decision unless: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1988); Phillips v. United Staes Postal Serv., 695 F.2d 1389, 1390 (Fed. Cir. 1982).

Mr. Seltzer has been receiving a CSRS annuity based on military and civilian service since his retirement in 1974. In 1986, OPM determined that Mr. Seltzer received two overpayments due to OPM error. Mr. Seltzer litigated these overpayments over several years, resulting in a decision by this court on one issue, Seltzer v. Office of Personnel Management, 833 F.2d 975 (Fed. Cir. 1987). That issue is not involved in this appeal. Here, the Board below found that: (1) OPM did not show that Mr. Seltzer received an overpayment resulting from a Social Security Administrative (SSA) offset for post-1956 military service; (2) OPM showed an overpayment resulting from an incorrect data entry for the period May 1985 to May 1986; and (3) Mr. Seltzer did not show entitlement to CSRS credit for his additional reserve service.

OPM must establish by a preponderance of the evidence that an overpayment occurred. 5 C.F.R. § 831.1407(a) (1992). The Board found that OPM failed to do so regarding the SSA offset, ordering OPM to contact the SSA to obtain the correct information. Mr. Seltzer asserts on appeal that OPM has not complied with the Board's orders. Without a Board review of these assertions, however, this court cannot address the issue. Lizut v. Department of Army, 717 F.2d 1391, 1396 (Fed. Cir. 1983). Mr. Seltzer must first bring challenges to any objectionable OPM recalculations to the MSPB.

The Board determined that, due to a lack of consistency in OPM reported data, OPM did not show an incorrect data entry resulting in an overpayment from December 1984 through April 1985. The Board did find, however, that OPM proved such an overpayment from May 1985 through May 1986. Mr. Seltzer argues that a June 1985 Notice of Adjustment Annuity he received shows the overpayment period beginning in June, not May 1985.

While the June 1985 Notice supports Mr. Seltzer's contention, it remains only circumstantial proof of the actual amount he received in May 1985. The Board had this and other evidence before it, including the Employee Annuitant Master Record Printout dated May 8, 1985. From the record presented, this court finds no reversible error in the Board's conclusion.

Finally, Mr. Seltzer has the burden of proving by a preponderance of the evidence that he is entitled to retirement credit. Bain

v. Office of Personnel Management, 49 M.S.P.R. 307, 309 (1991). Mr. Seltzer claims entitlement to credit for military service listed in his chronological service record as inactive duty points and extension course points.

Mr. Seltzer contends that these periods of military service should be treated as active duty, qualifying them for retirement credit. *See* 5 U.S.C. §§ 8331(13), 8332(c)(1)(A) (1988). The Board found that these periods failed to qualify as such. Mr. Seltzer has admitted he did not receive military pay throughout these periods. The Board looked beyond the service record to the substance of Mr. Seltzer's contention. The court finds no reversible error in the board's decision.

Mr. Seltzer makes several other assertions of error that the Board adequately addressed below. Therefore, based on this record, substantial evidence supports the board's findings. Mr. Seltzer has not shown them to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

APPENDIX G-1

United States Court of Appeals for the Federal Cirtuit

Received 11/23/92

92-3450

RICHARD L. SELTZER,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

ORDER

APPENDIX G-2

ORDER

Before MICHEL, Circuit Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue on November 25, 1992.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: November 18, 1992

by (s) Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: RICHARD L. SELTZER
JOHN P. SHOLAR

SELTZER V OPM, 92-3450
(MSPB - CH0831910663I-1)

FILED
U.S. COURT OF APPEALS
FOR
THE FEDERAL CIRCUIT
NOV 18 1992
FRANCIS X. GINDHART
CLERK

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

APPENDIX H

United States Court of Appeals for the Federal Circuit

Received 12/1/92

92-3450

RICHARD L. SELTZER,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
in CASE NO(S). CH083191066311
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED OCT 19 1992

(s) Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: November 25, 1992

APPENDIX I-1

Received 11/20/92

November 2. 1992 (Monday)

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163
(317) 861-5182

Clerk
U.S. Court of Appeals
for the Federal Circiut
717 Madison Place, N.W.
Washington, D.C. 20439

Ref: CAFC No. 923450
Seltzer v OPM

New Evidence submitted pertinent to this case before the Court.

Enclosures from the Social Security Agency speaking for both the records centers at SSA Baltimore, Maryland and Great Lakes, Chicago, Illinois show that the $27.00 SSA deduction by OPM retroactive to 1983 and the August 1, 1992 15.00 SSA reduction without notice, were not, repeat not, either attributed to military service by the SSA nor were they "recently required information from the Social Security Administration as received information" to support legally any of these past unsubstantiated collections by OPM from petitioner's annuity as stated by the Justice Department (page 11) in their cross-brief to the Court on July 10, 1992.

Seemingly both the Board (MSPB) and the Court (CAFC) now gives blanket affirmation to all issues to both the Board and OPM regardless of the facts now before the Court or the evidences in the record.

For the first time both the SSA and the petitioner have decided to get whatever evidences the OPM has to justify these actions the petitioner has argued against for over five (5) years since 1986. Based on the simple facts shown on enclosed Form SSA-655-U2

APPENDIX I-2

and enclosures, OPM has anywhere from another 45 to 90 days to respond; or not to respond. Petitioner is not of a mind to wait for this dilatory agency's answer, or lack of response.

Enclosures:
SSA Evidences
.Copy to: John P. Sholar
Dept of Justice 20530

Sincerely
(s) Richard L. Seltzer
Richard L. Seltzer

Leave to file is DENIED.

FOR THE COURT
11/17/92
Date
(s) F Gindhart
FRANCIS X. GINDHART
Clerk

APPENDIX J-1

Received 12/14/92

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

December 7, 1992

Mr. Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, IN 46163

Re: 92-3450 SELTZER v OPM

Dear Mr. Seltzer:

This will respond to your telephone conversation with Diane Frye on December 1.

Any petition for rehearing and suggestion for rehearing in banc must be submitted as a combined filing. The statement in my letter of July 21, 1992, that the suggestion should be filed separately, meant that the suggestion should not be included in your brief.

Your suggestion for rehearing in banc was circulated with your motion for new evidence and denied by the panel on November 17, 1992.

No further action will be taken.

Very truly yours,

(s) Francis X. Gindhart
Francis X. Gindhart
Clerk

d

APPENDIX J-2

July 25, 1992

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163
(317) 861-5182

Ref: CAFC No. 92-3450
Seltzer v. OPM

Clerk
U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Reference the Court's letter to petitioner dated July 21, 1992, regarding the in banc suggestion included in petitioner's brief dated June 16, 1992. The Court stated it should be done separately and provided in 15 copies.

In view of the timeliness of preparation of 15 copies and appendices and additional fact the appellee's brief has been filed, received and responded to, petitioner withdraws his in banc suggestion from his June 16, 1992 brief.

Petitioner will wait for the Court's decision on instant pro se case.

Sincerely,

(s) Richard L. Seltzer
Richard L. Seltzer, pro se

Copy to:

John P. Sholar
Justice Dept.
Wash., D.C. 20530

APPENDIX J-3

Received 7/23/92

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

July 21, 1992

Mr. Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, IN 46163

Re: 92-3450, SELTZER v OPM

Dear Mr. Seltzer:

The in banc suggestion should not be included in your brief. If you want to make it, the suggestion should be done separately and you must provide us with 15 copies.

Very truly yours,

(s) Francis X. Gindhart
Francis X. Gindhart
Clerk

df

cc: John P. Sholar

RETIREMENT WORKSHEET

NAME	DIRECTORATE/OFFICE	DATE
Seltzer, Richard L.	DLSC-A	7-8-74

AGE	DOB	SERVICE AS OF:
53	2-23-21	8-31-74

FROM	TO	SERVICE TIME YEARS	MONTHS	DAYS	RATE OF PAY	ACTUAL PAY AMT	%
10-7-73	8-31-74	30	10	24	16,138	14,524.20	.900
1-14-73	10-7-73	0	8	23	15,394	11,253.01	.731
8-20-72	1-14-73	0	4	24	14,641	5,856.40	.400
~~12-29-72~~	8-20-72	0	7	16	13,771	~~8,455.39~~	.614
8-31-71	~~12-29-72~~	0	4	28	13,053	~~4,646.37~~	.356
	TOTAL	3	36	490		44,735.87	

Annuity Date	8-30-74	3 Year High Salary	14,918.96
Basic Annuity	$ 6104.48	Service Comp Date	10-11-52
Plus Increases			Years / Months / Days
Gross Annuity	$ 6104.48	Fed Civ/Mil Service	21 / 10 / 20
REDUCTIONS		Unused Sick Leave 964	5 / 18
Decrease Due to Age .97667	(178.87)	Total Service Credit +09167	22 / 4 / 8
Non-Deposit		MILITARY SERVICE	
Optional Insurance	$	Discharges	
Refunds		Letter Waiving Military Retirement	
Survivor Benefits	$ 541	Death Certificate	
Health Program 105 (DELETED)	12 | 65.00	LIFE INSURANCE	
Estimated Net Annuity	$ 5863.61	Regular	
Est Monthly Annuity	$ 488.63	Optional	
REMARKS	541	Beneficiaries	
	+494 04	Survivor	
		Children	

HQ DFDS Form 871 Apr 72 (COLA 3.9) Replaces DLSC Form 871 which may be used

513 37

APPENDIX K-2

AIR MAIL

STATEMENT OF SERVICE
(Creditable under 37 USC 205)

LAST NAME – FIRST NAME – MIDDLE NAME	SERVICE NUMBER(S)/SOC SEC ACCT NUMBER
Seltzer Richard Lees	01 112 430 16 094 662 399-10-2606

NATURE OF ACTION (For enlisted – enter "ENL" and component.) (For commissioned – enter grade and component.)		EFFECTIVE DATES (For officers – enter date of acceptance.) (Inclusive dates of military status are in parenthesis.)	ACTIVE DUTY FROM	ACTIVE DUTY TO	SEPARATION (Indicate type and reason)
Enl	AUS	19 Aug 42	19 Aug 42		
Disch	AUS	30 Mar 43		30 Mar 43	Honorable/To accept commission and immediat active duty AUS
2LT (Temp)	AUS	1 Apr 43	1 Apr 43		
1LT (Temp)	AUS	25 Apr 45			
1LT	ORC	15 May 46			
Released A/D		18 Jul 46		18 Jul 46	Honorable/Demobiliza-tion
	ORC	19 Jul 46			
			6 Aug 49	22 Aug 49	Active duty training
CPT	ORC	13 Mar 50	20 Aug 50	3 Sep 50	Active duty training
Extended A/D		14 Oct 50	14 Oct 50		
CPT	AUS	14 Oct 50			
CPT	ORC	11 Oct 52			
MAJ (Temp)	AUS	11 Jul 56			
MAJ	USAR	11 Jul 56			
Released A/D		18 Nov 57		18 Nov 57	Honorable/Involuntary release non-regular officer/Trfd USAR
	USAR	19 Nov 57			
			6 Jun 59	21 Jun 59	Active duty training
			14 May 60	29 May 60	Active duty training
			22 Apr 61	6 May 61	Active duty training
			26 May 62	9 Jun 62	Active duty training

(CONTINUED)

TIME LOST (Inclusive dates)		
FROM	TO	DAYS
	NONE	

Page 1 of 2 Pages

DATE APR 2 2 1974

AUTHENTICATION

VERNE L. BOWERS
Major General, USA
The Adjutant General

AGVZ-ED-SO/SPZ

TO: (Include ZIP Code)
LTC Richard L. Seltzer
USAR Retired
726 Greenridge Rd
Battle Creek, MI 49015

DD FORM 1 JAN 67 13

PREVIOUS EDITIONS OF THIS FORM MAY BE USED.

STATEMENT OF SERVICE
(Creditable under 37 USC 205)

LAST NAME – FIRST NAME – MIDDLE NAME	SERVICE NUMBER(S)/SOC SEC ACCT NUMBER
Seltzer Richard Lees	01 112 430 16 094 662 399-10-2606

NATURE OF ACTION (For enlisted – enter "ENL" and component.) (For commissioned – enter grade and component.)	EFFECTIVE DATES (For officers – enter date of acceptance.) (Inclusive dates of military status are in parenthesis.)	ACTIVE DUTY FROM	ACTIVE DUTY TO	SEPARATION (Indicate type and reason.)
LTC USAR	11 Jul 63	31 Mar 63	12 Apr 63	Active duty training
		28 Jun 64	11 Jul 64	Active duty training
		27 Jun 65	10 Jul 65	Active duty training
		21 Aug 66	3 Sep 66	Active duty training
		16 Jun 68	29 Jun 68	Active duty training
		22 Jun 69	5 Jul 69	Active duty training
Transferred Retired Reserves	7 May 71			

TIME LOST (Inclusive dates)		
FROM	TO	DAYS
	NONE	

Page 2 of 2 Pages

DATE APR 2 2 1974

AUTHENTICATION

VERNE L. BOWERS
Major General, USA
The Adjutant General

TO: (Include ZIP Code)

DD FORM 1 JAN 67 13

PREVIOUS EDITIONS OF THIS FORM MAY BE USED.

APPENDIX L-1

United States
Office of
Personnel Management Washington, D.C. 20415

MAR 25 1985

CSB:GSM
In Reply To: CSA 1 730 093 Your Reference:

Richard L. Seltzer
RR 2 SM 7
New Palestine, Indiana 46163

Dear Mr. Seltzer:

In your letter dated January 30, 1985, you claimed that your military service between August 19, 1942 and January 24, 1953, was not included in the computation of your annuity.

Our records show that we included these periods in the computation of your annuity: 8-19-42 through 7-18-46 and 10-14-50 through 11-18-57.

The document you sent us shows that there were 17 days active duty between July 1, 1949 and June 30, 1950, and periods of duty between 1958 and 1964.

We will recompute your annuity to include the 17 days service in 1949. The periods between 1958 and 1964 maybe included also if you are not entitled to Social Security benefits based on your Post 56 military service. We have already requested this information from the Social Security Administration.

Your military service between January 30, 1964 and August 31, 1974, cannot be included in your annuity computation since they were credited as civilian service. Double credit for concurrent military and civilian service is not permitted under the Civil Service retirement law. (FPM Supplement 831-1 Subchapter 53-6(a-b).)

APPENDIX L-2

If you feel that the action of denying your credit for your military service between January 30, 1964 and August 31, 1974 is improper, you may request reconsideration. The BRI 46-46 is enclosed for your guidance.

Sincerely,

(s) Gloria S. Montecillo
Gloria S. Montecillo, Claims Examiner
Annuity Roll Service Branch II
Annuitant Services Division

Enclosure
BRI 46-46

R/SYM 1-CS-007 CHRONOLOGICAL RECORD OF MILITARY SERVICE DATE JAN 27 1981

CORRECTED COPY

SELTZER RICHARD L (NAME) 399-10-2606 (SOCIAL SECURITY NUMBER) 23 FEB 21 (DATE OF BIRTH) LTC (CURRENT GRADE) LTC (HIGHEST GRADE HELD)

1 BEGINNING DATE R	MO	DAY	2 ENDING DATE YR	MO	DAY	3 MILITARY PERSONNEL CLASS	4 STATUS OR COMPONENT	5 INACTIVE DUTY POINTS	6 EXTENSION COURSE POINTS	7 MEMBER SHAPE POINTS	8 ACTIVE DUTY POINTS	9 QUALIFYING FOR RETIREMENT YRS	MOS	DAYS	10 TOTAL POINTS CREDITABLE
42	08	15	43	03	30	ENL	AUS				224	00	07	12	0224
43	03	31	46	07	18	COM	AUS				1206	03	03	18	1206
46	07	19	49	06	30	COM	GRC					02	11	12	0147
49	07	C1	50	06	30	COM	USAR	21		15	17	01	00	00	0053
50	07	C1	51	06	30	COM	USAR	4	6	15	275-15	01	00	00	300
51	07	C1	52	06	30	COM	USAR				366	01	00	00	0366
52	07	C1	53	06	30	COM	USAR				365	01	00	00	0365
53	07	C1	54	06	30	COM	USAR				365	01	00	00	0365
54	07	C1	55	06	30	COM	USAR				365	01	00	00	0365
55	07	C1	56	06	30	COM	USAR				366	01	00	00	0366
56	07	C1	57	06	30	COM	USAR				365	01	00	00	0365
57	07	C1	58	06	30	COM	USAR			15	141	01	00	00	0156
58	07	C1	59	06	30	COM	USAR	23		15	16	01	00	00	0054
59	07	C1	60	06	30	COM	USAR	21		15	16	01	00	00	0052
60	07	C1	61	06	30	COM	USAR	30		15	15	01	00	00	0060
61	07	C1	62	06	30	COM	USAR	42		15	15	01	00	00	0072
62	07	C1	63	06	30	COM	USAR	24		15	13	01	00	00	0052
63	07	C1	64	06	30	COM	USAR	32		15	3	01	00	00	0050
64	07	C1	65	06	30	COM	USAR	25	16	15	16	01	00	00	0072
65	07	C1	66	06	30	COM	USAR	25	16	15	10	01	00	00	0066
66	07	C1	67	06	30	COM	USAR	18	16	15	14	01	00	00	0063
67	07	C1	68	06	30	COM	USAR	21	16	15	14	01	00	00	0066
68	07	C1	69	06	30	COM	USAR	27	16	15	9	01	00	00	0067
69	07	C1	70	06	30	COM	USAR			15	5	00	00	00	0020
70	07	C1	70	12	03	COM	USAR			6		00	00	00	0006
70	12	04	71	04	29	COM	INACT					00	00	00	0000
71	04	30	~~73~~	~~08~~	~~30~~	COM	RETIRED								
			81	02	23										

1. ACTIVE DUTY
2. ACTIVE DUTY FOR TRAINING

TOTAL 20 10 12 4978

TOTAL SERVICE (QUALIFYING AND NONQUALIFYING) FOR LONGEVITY PURPOSES 38 06 04

APPENDIX N

United States
Office of Personnel Management

Retirement and Insurance Programs
Washington, D.C. 20415
06/01/85

IN REPLY PLEASE REFER TO
CLAIM IDENTIFICATION
A1730093

RICHARD L SELTZER
RURAL RT 2
SPRING MEADOWS 7
NW PALESTINE IN 46163

NOTICE OF ADJUSTMENT ANNUITY

This concerns a change in the annuity payable to you. Please keep this notice for your personal records. If you have any questions concerning this adjustment, contact us at the address shown above.

	GROSS MONTHLY ANNUITY	MONTHLY HEALTH BENEFITS	MONTHLY MEDICARE	OTHER DEDUCTIONS OR ADDITIONS CODE	AMOUNT	CODE	AMOUNT	NET MONTHLY CHECK	
OLD STATUS ▶	1006.00			12	-88.69	31	-64.56	852.75	YOUR OLD CHECK BEFORE ADJUSTMENT
NEW STATUS ▶	1418.00			31	-130.25			1287.75	NEW CHECK BEGINNING 06/01/85

REASON FOR ADJUSTMENT
YOUR FEDERAL INCOME TAX WITHHOLDING HAS CHANGED OR HAS BEEN TERMINATED. FEDERAL INCOME TAX DEDUCTIONS ARE AUTOMATICALLY ADJUSTED WHEN THERE IS A CHANGE IN YOUR GROSS MONTHLY ANNUITY RATE OR CURRENT FEDERAL TAX WITHHOLDING RATES ARE REVISED.

SEE OTHER SIDE FOR CODES FOR OTHER DEDUCTIONS AND ADDITIONS

BRI 49-127
Rev. April 1982

APPENDIX O-1

Received 4-16-86 (?)

United States
Office of
Personnel Managemet Washington, D.C. 20415

In Reply To Your Reference
CCP:GSM:fd
CSA 1 730 093

Richard L. Seltzer
Rural Rt. 2 SM 7
New Palestine, Indiana 46163

Dear Mr. Seltzer:

The annuity previously granted you as a retired employee of the United States Government has been recomputed.

Based on Reconsideration Staff finding, we have allowed credit for additional periods of service shown on your DD Form 13, which were not used by Social Security Administration in computing your award.

However, in going through the previous recomputation of your annuity, we found that your rate effective 12/1/84, which should have been $1014.00 per month, was erroneously imput as $1418.00. This error has caused further an overpayment of $404.00 per month beginning 12/1/84. We deeply regret the inconvenience caused you by this error. The enclosed statement shows your correct rates.

The following periods of service are used in your annuity computation:

APPENDIX O-2

From	To		Years	Months	Days
08/1/9/42	07/18/46	=	3	11	0
07/14/49	08/31/49	=			17
08/06/49	08/22/49	=			17
08/20/50	09/03/50	=			14
10/14/50	11/18/57	=	7	1	5
06/06/59	06/21/59	=			16
05/14/60	05/29/60	=			16
04/22/61	05/06/61	=			15
05/26/62	06/09/62	=			14
03/30/63	04/12/63	=			13
01/30/64	08/30/74	=	10	7	1
Sick leave = 982 hours		=		5	20
			(22)	(28)	(148)
Total service used		=	22 years	4 mos.	28 days

Your military service between June 24, 1964 and July 9, 1969 has been credited as civilian service. Under the Civil Service Retirement law, you cannot receive dual credit for civilian and military service performed during the same period of time.

If you feel this action is improper, you may request reconsideration. BRI 46-46 is enclosed for your guidance.

Sincerely,

Gloria S. Montecilla, Claims Examiner
Adjudication Division II

life and became an active reserve officer as a second lieutenant. This is the information that is in the brief attached to the basic file. I show here only the active duty orders as I have mentioned as a first lieutenant beginning with special orders on March 30, '49 and further 12, December, '49 and I placed on active duty as a communications system S-3. Much of my active duty requirements were to visit post, camps and stations and to actually investigate organized reserve corps units in training. I was a training officer, information, education. None of this time -- none of this time is eliminated basically in any -- it's neither maintenance nor is it time on a pay status. It is not a prohibitive time as far as any of the regulations so far have read. Now a comment here personally. Appellant, over the years, has truthfully submitted these same facts. He feels as it is now presented here that the preponderant evidence has been more than furnished by him. He feels the burden is on OPM to respond. Whether pro or con, no response has been made. The problem no longer rests wiht Appellant. He says this basically in this brief.

The two week summer camp, Page 2, reference Exhibit G-2 and G-3. G-2 and G-3 ---

Q. One minute, Mr. Seltzer.

A. Yeah.

APPENDIX Q-1

June 8, 1992

Richard L. Seltzer
4839 W. Quail Run Drive
New Palestine, Indiana 46163
(317) 861-5182

Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, Room 956
Washington, D.C. 20419

Ref: CAFC No. 92-3450
Seltzer V. OPM

Index of Documents dated June 4, 1992 is incomplete. Additional documents making up the administrative record of petitioner's petition for review (CH0831910663I-1) that also are in your custody are the following entered into evidence at the October 17, 1991 Hearing at the request of the administrative judge:

1. Letter from appellant to OPM, January 30, 1985.
2. Letter from appellant to OPM, April 4, 1985.
3. Letter and enclosures from appellant to MSPB, April 25, 1986.
4. Letter and enclosures from appellant to MSPB, June 5, 1986.
5. Letter and enclosures from appellant to MSPB, July 8, 1968.
6. Letter and enclosures from appellant to MSPB, September 4, 1986.

(These evidences are listed on Transcript Page at 6 (answer) included in Docket No. CH08318610427).

Also in your custody are following documents cited as factual evidences both in the Hearing Brief and/or Transcript dated October 17, 1991.

1. Letter from appellant to OPM, dated May 9, 1989 (45 enclosed pages of military service facts on active reserve dates).
2. Letter from appellant to MSPB, June 13, 1991, copy of above.
3. Letter from appellant to MSPB, December 20, 1989.
4. Letter and enclosures from appellant to MSPB, February 5, 1990.

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5. Orders of Remand to MSPB Region from MSPB Hq., May 3, 1991.

6. Letter OPM to MSPB reaffirming reconsideration date of October 12, 1989, dated August 16, 1992. (May be in response file you date Aug. 21, 1991).

(These evidences are listed in Hearing Brief entered as evidence at the October 17, 1991 Hearing and cover these Docket Nos. and files also in your custody; CH08318910189, CH08318910690 and CH08318910690-1. The Board was to consider these documents listed above in present appeal/petition CH08319106631-1.

Petitioner's Brief on current case will be an informal brief including an appendix which includes pages to support parts of the record from above documents in addition to those listed in your June 4, 1992 index. This appendix is in accordance with the Court's Rule 30(a)(2).

Therefore, in accordance with the Court's Rule 30(b), Determination of Contents of Appendix (--"The parties are encouraged to agree as to contents of an appendix that will comply with this Federal Circuit Rule 30") these additional documents are also in your custody and will be parts of the Brief Appendix in support of facts presented.

1. Letter from appellant to MSPB, October 2, 1989.

2. Letter from appellant to MSPB, September 20, 1991 (may be the Sep. 24, 1991 response to hearing notice), with enclosed listing of all documents of record in case No. CH0831910663U-1.

3. Letter and enclosures from appellant to MSPB, August 6, 1991, Requested Motion to Compel Discovery.

Petitioner requests concurrence and agreement with all of above dated documents and enclosures becoming wholly, or in part, numbered inclusions to the appendix that accompanies petitioner's Informal Brief to the Court.

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Further request reply as soon as possible so petitioner can comply in a timely manner to the Court's order (within 21 days from June 4, 1992).

Sincerely,

(s) Richard L. Seltzer
Richard L. Seltzer

Copy furnished this date by
Regular First-class mail to:

Clerk, U.S. Court of Appeals
for the Federal Circuit, Wash., D.C. 20439

Mr. David M. Cohen, Department of Justice
Wash., D.C. 20419